RECORD AND BRIEFS

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NO. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue whether the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), codified at 15 U.S.C. § 78u-6(h), applies to employees who have not reported a violation of the securities laws to the Securities and Exchanges Commission, when Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]." 15 U.S.C. § 78u-6(a)(6).[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored their amicus brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amici state that counsel of record for each party has filed with the Court a blanket letter of consent to the filing of amicus briefs.

small businesses located primarily in the New England region.

AIM is a 100-year-old nonprofit, nonpartisan association, with over 4,500 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to enforcing federal statutes according to their terms. When, as here, a statute provides a specific and unambiguous definition of a term, that definition must apply wherever the term appears in the statute. Any change to the statute must come from the Legislature, not the Judiciary.

In addition to this amicus brief, amici have filed many other amicus briefs in this Court, arguing for the enforcement of federal statutes according to their terms.[2]

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding the issue presented in this case.

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[2] *See, e.g., Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

SUMMARY OF ARGUMENT

At issue is the meaning of a subsection of Dodd-Frank's "Securities whistleblower incentives and protection" section, 15 U.S.C. § 78u-6, which protects "a whistleblower [from retaliation in the workplace] . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act [SOX] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6). SOX, however, affords protection to the employee who only reports a potential securities law violation to his employer. And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to his employer.

The lower court erred because it abandoned Dodd-Frank's clear provision that a "whistleblower" is an employee who reports to the SEC. This definition must apply whenever the word "whistleblower" appears in the disputed subsection of Dodd-Frank. And applying this definition to the disputed language yields only one meaning. The employee who reports information to the SEC is protected when he *also* reports that information to his employer and then suffers retaliation because of his internal reporting.

This subsection of Dodd-Frank therefore protects an employee who has reported to both the

SEC and her employer, when the employer does not know that the employee has reported to the SEC. And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank. She would only be protected under SOX for her internal reporting. By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

The Ninth Circuit apparently rejected the statute's plain meaning. In that court's view, the disputed language identified a set of circumstances that was "narrow[] to the point of absurdity . . . ." Appendix to Petitioner's Petition for Certiorari 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort. Nor is it a court's role to conform an unambiguous statute such as this one to the court's own notion of what Congress may have had in mind.

But this is precisely what the Ninth Circuit did here, when it "interpreted" the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. The Ninth Circuit impermissibly substituted the word "employee" for the defined term "whistleblower." And Dodd-Frank's specific definition of a whistleblower excludes all other possible meanings of that term. Moreover, Congress chose the word "employee" in SOX's whistleblower provision but did not do so when it later enacted Dodd-Frank. It must be presumed that this choice was deliberate.

In any event, it is hardly absurd for Congress to assume that an employee may choose to report to both the SEC and her employer, and that the employer may not know that such an employee has reported to the SEC. Consistent with SOX's purposes, an employee may wish to report a potential violation to her employer, for speedy internal resolution of the matter. But, consistent with Dodd-Frank's purposes, that same employee may also wish to alert the SEC to the matter, to secure her right to pursue Dodd-Frank's special financial incentives (a potentially large bounty) and legal protection (including the right to recover double back pay). And the employer may not know that such an employee has reported to the SEC because Dodd-Frank and the SEC regulations both preserve the confidentiality of a whistleblower's identity.

If allowed to stand, the Ninth Circuit's decision would certainly eviscerate Dodd-Frank's definition of a whistleblower. But in so doing, the lower court's approach would also contravene Congress' purpose of linking Dodd-Frank's special financial incentives with its enhanced remedial protection. In the lower court's view, an employee can sue for retaliation under Dodd-Frank even though he is not eligible for a bounty under that statute, because he has not reported to the SEC. But Dodd-Frank's incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting information to the SEC.

ARGUMENT

I. THE DODD-FRANK ACT, BY ITS OWN PLAIN TERMS, ONLY PROTECTS EMPLOYEES WHO REPORT POTENTIAL SECURITIES LAW VIOLATIONS TO THE SECURITIES AND EXCHANGES COMMISSION.

A. Dodd-Frank Defines A "Whistleblower" As An Employee Who Reports Information To The SEC, and That Definition Must Apply Each Time The Word "Whistleblower" Occurs In The Statute.

At issue is the meaning of a subsection of the "Securities whistleblower incentives and protection" section of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), 15 U.S.C. § 78u-6. The disputed subsection prohibits an employer from retaliating against "a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 *et seq.*) ["SOX"] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6).

SOX, however, affords protection to the employee who only reports a potential securities

law violation to "a person with supervisory authority over the employee," i.e., her employer. 18 U.S.C. § 1514A(a)(1)(C).[3] And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to her employer. Appendix to Petitioner's Petition for Certiorari ("App.") 7a-10a.

The lower court erred because it abandoned Dodd-Frank's clear provision that a "whistleblower" is an employee who reports to the SEC. 15 U.S.C. § 78u-6(a)(6). Contrary to the Ninth Circuit's view, a court must apply a specific statutory definition of a term each time that term appears in the statute. "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

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[3] To be precise, SOX protects an employee from workplace discrimination when he reports to "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (B) a person with supervisory authority over the employee . . . ." 18 U.S.C. § 1514A(a)(1)(A)-(C).

B. The Disputed Subsection Of Dodd-Frank Simply Means That An Employee Who Reports Information To The SEC Is Protected When He Also Reports That Information To His Employer And Then Suffers Retaliation For His Internal Reporting.

Applying Dodd-Frank's definition of a whistleblower to the disputed subsection yields only one meaning. The employee who reports information to the SEC is protected when he *also* reports that information to his employer and then suffers retaliation because of his internal reporting. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation and internal quotation marks omitted).

In particular, the disputed subsection provides, in relevant part:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any

> other manner discriminate against, *a whistleblower* in the terms and conditions of employment *because of any lawful act done by the whistleblower*-- . . .
>
> **(iii)** *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* (15 U.S.C. 7201 *et seq.*) . . . .

15 U.S.C. § 78u-6(h)(1)(A)(iii) (emphasis added).[4] And SOX, it has been noted, protects an employee

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[4] This subsection provides, in full:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--
>
> **(i)** in providing information to the Commission in accordance with this section;
>
> **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> **(iii)** in making disclosures that are required or protected under the Sarbanes-

who reports a securities law violation to her employer. 18 U.S.C. § 1514A(a)(1)(C).

And so, applying the statutory definition of a whistleblower, at 15 U.S.C. § 78u-6(a)(6), to the disputed text yields the following result:

> No employer may . . . discriminate . . . against [any individual who provides . . . information relating to a violation of the securities laws to the [SEC]] . . . because of any lawful act done by th[at] [individual] . . . in making [internal] disclosures that are . . . protected under [SOX] . . . .

15 U.S.C. § 78u-6(h)(1)(A)(iii). That is, Dodd-Frank protects an employee from retaliation when he provides information to the SEC but *also* discloses the same information to his employer, and his employer retaliates against him because of his internal reporting.

This subsection of Dodd-Frank, therefore, protects the employee who has reported to both the SEC and her employer, when her employer does not know that she has reported to the SEC. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620,

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> Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*) [SOX], this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii).

627-28 (5th Cir. 2013) (discussing same). And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank for her internal reporting. *See id.*[5] She would only be protected under SOX. *See* 18 U.S.C. § 1514A(a)(1)(C). By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

C. The Ninth Circuit Engaged In Impermissible Judicial Legislation By Refusing To Enforce The Statute According To Its Plain Terms.

The Ninth Circuit was apparently unwilling to accept the plain meaning of § 78u-6(h)(1)(A)(iii). Indeed, the lower court rejected the scope of that subsection as being "narrow[] to the point of absurdity . . . ." App. 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort. "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989).

After all, in matters of social and economic regulation, such as here, Congress is free to define a protected class as specifically as it chooses.

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[5] *See also* n.4, above. The other categories of protected activity under Dodd-Frank apply only when an employee has supplied information to the SEC or has participated in an SEC enforcement action based on that information. *See* 15 U.S.C. § 78u-6(h)(1)(A)(i)-(ii).

"[Legislative] reform may take one step at a time." *United States v. Morrison*, 529 U.S. 598, 631 n.2 (2000) (citation and internal quotation marks omitted). *See also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18 (2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done . . . [here, to protect the employee who reports to both the SEC and his employer from retaliation for his internal reporting,] devoid of reason and effect.").

Nor is it a court's role to rewrite an unambiguous statute to fit the court's own notion of what Congress may have had in mind. "It is not our role to conform an unambiguous statute to what we think Congress probably intended[.]" *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 n.6 (2009) (internal quotation marks omitted).

But this is precisely what the Ninth Circuit did here, when it "interpreted" the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. In so doing, the Ninth Circuit engaged in impermissible judicial legislation because it effectively substituted the word "employee" for the defined term "whistleblower." *See* App. 10a. But the lower court had no business making such a change. "We must presume that the legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citation and internal punctuation marks omitted). Moreover, "[i]t is axiomatic that the statutory

definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987).

Notably, Congress chose the word "employee" in SOX's whistleblower provision, 18 U.S.C. § 1514A(a), but it did not do so when it later enacted § 78u-6 in Dodd-Frank. It must be presumed, then, that Congress' omission of the word "employee" in Dodd-Frank was deliberate. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal punctuation marks omitted). In short, the Ninth Circuit had no basis to disregard the plain meaning of the disputed subsection.

D. Dodd-Frank's Protection Of The Employee Who Reports To Both The SEC And His Employer Is Not So Bizarre That Congress Could Not Have Intended It.

In any event, Dodd-Frank's protection of the employee who reports to both the SEC and his employer from retaliation for his internal reporting is hardly absurd. "We cannot say that [affording protection under such circumstances] is *so bizarre that Congress could not have intended it.*" *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)

(emphasis added) (citation and internal quotation marks omitted).

In particular, the scope of the disputed subsection rests on two assumptions: (1) that an employee would choose to report to both the SEC and his employer, and (2) that the employer would not know that such an employee has reported to the SEC. Neither of these assumptions is "so bizarre" or absurd that it would warrant judicial disregard of the statute's plain meaning.

For instance, an employee may choose to report a potential violation to her employer, to bring the matter to its immediate attention for quick internal resolution. After all, SOX was enacted precisely to encourage and protect such internal reporting. *See* 18 U.S.C. § 1514A(a)(1)(C). But that same employee may also wish to alert the SEC to the matter at this early stage, to secure her right to pursue Dodd-Frank's special financial incentives and legal protections. Indeed, Congress enacted Dodd-Frank in response to the 2008 financial crisis, and the whistleblower provision was designed to motivate corporate insiders to come forward and report potential securities law violations to the SEC, in order to assist that agency in enforcing the securities laws.[6]

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[6] In fact, Congress received testimony that the SEC depended primarily on the tips of corporate insiders to identify and successfully prosecute claims of securities fraud. *See* S. Rep. 111-176, at 110-11 (2010) ("In a testimony for the Senate Banking Committee, Certified Fraud Examiner and Madoff whistleblower Harry Markopolos testified in support of creating a strong Whistleblower Program. He cited statistics showing the efficiency of Whistleblower Programs:

In particular, § 78u-6 requires the SEC to award the Dodd-Frank whistleblower a substantial bounty if her reporting of original information to that agency results in a successful administrative or judicial enforcement action. 15 U.S.C. § 78u-6(b).[7] But if an employee who reports a violation internally delays too long in reporting that information to the SEC, the SEC may learn of the information from another source. At that point, the information would no longer be "original" under

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'*whistleblower tips detected 54.1% of uncovered fraud schemes in public companies*. External auditors, and the SEC exam teams would certainly be considered external auditors, detected a mere 4.1% of uncovered fraud schemes. *Whistleblower tips were 13 times more effective than external audits, hence my recommendation to the SEC to encourage the submission of whistleblower tips.*' In his letter to Senator Dodd, SEC Inspector General David Kotz also recommended a similar Whistleblower Program.") (emphasis added).

[7] In particular, § 78u-6(b) requires the SEC to pay a whistleblower an award from the Investor Protection Fund (§ 78u-6(g)), in an amount between 10% and 30% of the penalties collected by the SEC in a "covered judicial or administrative action" resulting from "original information" provided by that whistleblower. 15 U.S.C. § 78u-6(b)(1)(A)-(B).

"Original information" is information that "is derived from the independent knowledge or analysis of a whistleblower [and] . . . is not known to the Commission from any other source . . . ." 15 U.S.C. § 78u-6(a)(3)(A)-(B). A "covered judicial or administrative action," in turn, is "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. § 78u-6(a)(1).

Dodd-Frank, and the employee would no longer qualify for a bounty.[8]

Section 78u-6 also provides the Dodd-Frank whistleblower with generous legal protection. In particular, the Dodd-Frank whistleblower enjoys a direct right of action in federal court to recover double back pay, subject to a generous six-year limitations period that can be tolled for up to ten years. 15 U.S.C. § 78u-6(h).[9] By contrast, SOX offers none of these protections.[10] Consequently, the employee who reports to her employer, as a SOX whistleblower, would want to qualify quickly as a Dodd-Frank whistleblower (by reporting to the

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[8] *See* n.7, above.

[9] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (providing private right to sue in federal court for retaliation for engaging in protected activity, as defined in § 78u-6(h)(1)(A)(i)-(iii)); § 78u-6(h)(1)(B)(iii)(I)-(II) (providing statute of limitations of six years after date of violation, tolled by three years after date "when facts material to the right of action are known or reasonably should have been known," and capped by ten-year statute of repose); § 78u-6(h)(1)(C)(i)-(iii) (providing prevailing employee with reinstatement, double back pay, litigation costs, expert witness fees, and reasonable attorneys' fees).

[10] Under SOX, for example, the employee has no direct right of action and must instead file a claim with the Secretary of Labor before obtaining the right to sue in federal court. 18 U.S.C. § 1514A(b)(1)(A). And that administrative filing requirement is subject to a clipped 180-day limitations period. 18 U.S.C. § 1514A(b)(2)(D). Finally, while the prevailing employee may recover compensatory and special damages under SOX, she cannot recover double back pay. *See* § 18 U.S.C. § 1514A(c)(1)-(2).

SEC), before her employer may take any adverse action against her due to her internal reporting. In short, it is neither absurd nor bizarre to assume that an employee may wish to report to both the SEC and her employer.

Nor is it so bizarre to assume that an employer may not know that such an employee has reported to the SEC. This is because Dodd-Frank preserves the confidentiality of a whistleblower's identity when she reports to the SEC, unless and until the disclosure of her identity is necessary in the SEC's enforcement action. 15 U.S.C. § 78u-6(h)(2)(A).[11]

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[11] That subsection provides, in relevant part:

> Except [under limited circumstances], the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, . . . unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission . . . .

15 U.S.C. § 78u-6(h)(2)(A). Moreover, the SEC allows whistleblowers to report tips through its confidential website and ensures that "[t]he SEC treats all tips, complaints and referrals as confidential and nonpublic, and does not disclose such information to third parties, except in limited circumstances authorized by statute, rule, or other provisions of law." https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Aug. 25, 2017).

In sum, the plain meaning of the disputed subsection is far from absurd. Indeed, it actually serves the twin aims of SOX and Dodd-Frank, by encouraging an employee to report potential violations of the securities laws to both his employer and the SEC. Therefore, courts should enforce § 78u-6(h)(1)(A)(iii) according to its plain terms, and the Ninth Circuit's decision should be reversed.

II. THE NINTH CIRCUIT'S APPROACH WOULD CONTRAVENE CONGRESS' CLEAR PURPOSE OF LIMITING THE AVAILABILITY OF DODD-FRANK'S FINANCIAL INCENTIVES AND REMEDIAL PROTECTION TO THE EMPLOYEE WHO HAS EARNED THEM BOTH, BY REPORTING TO THE SEC.

If allowed to stand, the Ninth Circuit's decision would clearly eviscerate Dodd-Frank's definition of a whistleblower. But in so doing, the lower court's approach would also contravene Congress' clear purpose of linking Dodd-Frank's special financial incentives with its enhanced remedial protection.[12] In the Ninth Circuit's view, an employee may sue for retaliation under Dodd-Frank even though he does not qualify for a bounty, because he has not reported to the SEC.

But this is not what Congress had in mind. After all, the provision is titled "Securities whistleblower incentives *and* protection." 15 U.S.C. § 78u-6 (emphasis added). And, true to

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[12] *See* notes 7 and 9, above.

its title, that provision expressly limits its financial incentives and its legal protection to the "whistleblower," i.e., the employee who reports to the SEC. 15 U.S.C. § 78u-6(a)(6).

In Congress's judgment, then, Dodd-Frank's incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting to the SEC.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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